



May 6, 2020

Via email: francois.daigle@justice.gc.ca

François Daigle
Associate Deputy Attorney General
Justice Canada
284 Wellington Street
Ottawa, ON
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Dear Mr. Daigle:

Re: COVID-19 – Impediments to Justice Canada Proceeding before the Federal Court

I hope that you, your colleagues, and your families are safe and well. I write on behalf of the Canadian Bar Association members of Federal Courts Bench and Bar Liaison Committee to raise concerns about the technological challenges Justice Canada faces in operating remotely during the COVID-19 pandemic. These technological difficulties may hinder the Federal Court's efforts to implement remote processes like virtual hearings and thus create a barrier to access to justice.

The CBA is a national association of 36,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The CBA members of the Bench and Bar Committee represent areas of law in the core jurisdiction of the Federal Court.¹

Public health officials have stated that physical distancing requirements may remain in place for several months and further interruptions may be anticipated in a second or third wave of the pandemic. Health and safety must be our top priority, but we are concerned about the access to justice implications of a prolonged suspension of Federal Court proceedings.

The Federal Court has indicated that it is willing and able to proceed with virtual hearings and electronic filings. Chief Justice Paul Crampton has also recognized that parties will not be expected proceed if they are unable. However, because the Government of Canada is a party in most Federal Court proceedings, Justice Canada must have the necessary technology in place to proceed virtually as soon as possible if the Court's initiative is to work.

¹ While Justice Canada is represented on the Federal Courts Bench and Bar Liaison Committee, those representatives do not participate in any public statement of the Committee, including this letter.

While we appreciate the challenges Justice Canada faces in improving its capacity to work remotely and the difficulty in safely accessing paper-based files located in its offices, we are troubled by the consequences of a prolonged disruption. We fear a crippling backlog could develop if the suspension continues and Justice Canada remains unable to access the necessary files and properly prepare for hearings. A lengthy disruption of activities could also compromise both the financial circumstances of applicants and the viability of law firms, including smaller firms and sole practitioners. As a result, applicants and other litigants will have greater difficulty obtaining legal representation when regular operations resume. This could have serious access to justice consequences, including increased numbers of self-represented litigants (especially in immigration and refugee matters), and exacerbated delays due to missed filing deadlines and motions seeking extensions of time. If some cases are resolved remotely instead of being delayed, all stakeholders will benefit from a reduced backlog when regular operations resume.

We are heartened by the efforts of government agencies and boards such as the Immigration Appeals Division and the Canada Border Services Agency to transition to more comprehensive electronic-based litigation protocols. Members of the private bar are also enhancing their technological capabilities to ensure the progression of current cases and the advancement of new matters despite the pandemic. While we are also encouraged by the temporary e-service measures recently introduced by Justice Canada, this does not resolve our concerns.² Justice Canada is an important participant in court processes and must be given the technical support and means necessary to implement more comprehensive virtual practices. We must all find new ways to work safely while preserving the integrity and functionality of the court process.

The need for a new and innovative way forward was recently summarized by the Chief Justice of the Ontario Superior Court, the Honourable Geoffrey Morawetz:³

For a time, our familiar road to the courthouse is impassable [but] the courts are not closed. They're working on clearing a new and temporary path to justice. It's not a path we've walked before. It is not a path we will walk forever, but if we are to have justice in our time of struggle, it is a path that we must all walk together.

We urge you to take all necessary steps to give Justice Canada the technological resources and support needed to implement virtual processes and facilitate the remote operation of the courts.

We would be delighted to discuss this issue at your convenience.

Yours truly,

(original letter signed by Nadia Sayed for Kamleh Nicola)

Kamleh Nicola
Chair, Federal Courts Bench and Bar Liaison Committee

cc. Lynn Lovett, Assistant Deputy Attorney General, National Litigation Sector
Catherine Lawrence, Director General and Senior General Counsel, Justice Canada

² Canada, Service on the Crown, <https://www.justice.gc.ca/eng/contact/comm3.html>

³ Chief Justice Geoffrey Morawetz, "Paper-based system is not going to exist anymore," Chief Justice Morawetz says of post Covid-19 court," *The Lawyers' Daily*, April 15, 2020, online: <https://www.thelawyersdaily.ca/articles/18576>